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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 31

BENJAMIN W. COREY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On A Writ of Certiorari To the United States Court of Appeals For the First Circuit

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals, *Corey* v. *United States*, dated September 18, 1962, is reported at 307 F. 2d 839 (1st Cir. 1962), (R. 19). No opinion was written in denying rehearing.

JURISDICTION

The judgment dismissing the appeal as too late, was made and entered September 18, 1962. (R. 19) A petition for rehearing was denied October 3, 1962. (R. 23) The jurisdiction of this Court is invoked under Title 28, U. S. Code, section 1254(1).

QUESTION PRESENTED

Is a commitment to the custody of the Attorney General under 18 U. S. Code § 4208(b) a final judgment for purpose of appeal, or does the judgment become final when the study and recommendations required by that statute have been received by the trial court, evaluated, and used as a basis for final disposition of the case?

STATUTES AND FEDERAL RULES INVOLVED

Title 18 U. S. Code § 4208(b), 72 Stat. 845, reads as follows:

(b) If the court desires more detailed information *as a basis for determining the sentence to be imposed,* the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes *would be helpful in determining the disposition of the case,* shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. *After receiving such reports and recommendations,* the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section. (Italics supplied)

§ 4208(a), (c) and (d), are set out in the Appendix, together with Federal Rules of Criminal Procedure, 37(a)(2), 39(a), and 46 (a)(2).

STATEMENT

Defendant was convicted by jury of submitting false claims to the Government in violation of Title 18, U. S. Code, § 287. The District Court, April 9, 1962, ordered that he be "committed to the custody of the Attorney General of the United States under Title 18, United States Code, 4208(b)" (R. 8-9, 14). No appeal was taken from that order.

That statute, by its express terms is used "If the court desires more detailed information as a basis for determining the sentence to be imposed * * *." It requires a study and recommendation by the Bureau of Prisons within 90 days. The court received and considered this report, and, in accord therewith, on July 16, 1961,[1] suspended sentence, releasing the defendant on probation. (R. 11)

Notice of appeal was given July 19, 1962, seeking substantive review of the trial proceedings (R. 11).[2] The Government moved to dismiss the appeal on the ground that the original commitment by statute was deemed to be for the maximum sentence authorized by law—375 years imprisonment and fines of $750,000;[3]

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[1] Proceedings in open court took place July 16, though formal entry is dated July 17. The difference is not material.

[2] The docket entries (R. 11) show this Notice of Appeal was filed July 19, while the Clerk's office apparently stamped this July 20 (R. 9). The difference is not material.

[3] This resulted from a finding of guilty on each of 75 counts. Each is punishable by 5 years imprisonment, a $10,000 fine, or both. Title 18, U. S. Code, § 287.

the Government contended, therefore, the defendant was not aggrieved by the reduction of sentence. (R. 13)[4]

September 18, 1962, the Court of Appeals dismissed the appeal, holding that when the defendant was committed to the custody of the Attorney General for study on April 9, 1962, "the defendant was on notice as to the extent of his punishment. If he desired to appeal, this was the time he should have acted." Accordingly, the right to appeal was held to be lost when the 10-day period for giving notice, prescribed by Rule 37(a)(2), Federal Rules of Criminal Procedure, expired after April 9, 1962 (R. 19).

ARGUMENT

I. The Court of Appeals Erred in Dismissing the Appeal as Coming Too Late, Because There Was No Final, Appealable Judgment Until the District Court Had Fully Performed Its Statutory Duty

When Congress enacted the Federal Sentencing Act of 1958,[5] it gave the district judges an opportunity to secure "more detailed information as a basis for determining the sentence to be imposed." To say that this looks to a future sentence is almost too obvious for statement. The law requires a report within three months, with "recommendations which the Director of the Bureau of Prisons believes would be helpful in

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[4] Following an outstanding military career in counterintelligence during World War II, including a parachute jump into occupied France behind the enemy lines, petitioner was graduated from the Harvard Law School, and practiced law in Massachusetts and New York. He returned to military duty in the Korean War and subsequently experienced some psychiatric maladjustment (R. 2). A knowledge of these matters led the trial court to utilize the procedures of § 4208(b). See *infra*, pp. 9-11.

Petitioner seeks by appeal to reverse the conviction, and thus preserve his professional standing. Counsel represent that such an appeal would present legal questions of substance, and would not be frivolous.

[5] 18 U. S. Code, § 4208(b), Act of August 25, 1958, 72 Stat. 845.

determining the disposition of the case * * *." In the light of this language it requires extensive reaching to conclude that the mere request for such a preliminary report constitutes in itself a "disposition of the case."

A. Finality of Judgments, for Purpose of Appeal, Is Measured by Completion of the Judicial Function, Not by a Defendant's Imputed Knowledge of Results

In dismissing the appeal, the First Circuit held that when the district court on April 9, 1962, (R. 20) committed petitioner to the custody of the Attorney General under Title 18 U.S.C. § 4208(b), by statute he was considered to be under the maximum sentence authorized by law: "Consequently, at this point the defendant was on notice as to the extent of his punishment. If he desired to appeal, this was the time he should have acted." For this reason, it was held, the 10-day period for appeal (Rule 37) began running April 9, and not at the later date, June 16, 1962, when the court had received and studied the reports and recommendations of the Director of the Bureau of Prisons, and, acting on that basis, released petitioner on probation (R. 11). See statement of the District Judge, *infra*, p. 12.

Such analysis would make a judgment final whenever "the defendant was on notice as to the extent of his punishment." This is contrary to every decision known on questions of finality.

Language often quoted on the subject is that of Chief Justice Hughes in *Berman* v. *United States*, 302 U.S. 211 (1937), at page 212:

> Final judgment in a criminal case means sentence. The sentence is the judgment. * * * In criminal cases, as well as civil, the judgment is final for purpose of appeal [213] "when it terminates the litigation between the parties on the merits" and "leaves nothing to be done but to enforce by execution what has been determined."

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Finality is for general purposes the keynote of appellate jurisdiction. Title 28, U. S. Code, § 1291, 62 Stat. 929, June 25, 1948. In spite of the clear statement above quoted, the question of finality still proves difficult.

The statutory scheme contemplated by the Federal Sentencing Act, supra, now Title 18, U. S. Code § 4208, is quite simple: If the court needs more detailed information, it may secure it from the Bureau of Prisons while the defendant is in custody for study and recommendations to be made within 90 days. After the court has received this information, it may release the defendant on probation, affirm the original commitment, which is deemed to be the maximum authorized, or reduce the sentence and commit the defendant under any applicable law.

Plainly, the district court is not through with the case when the defendant is first committed under this statute. The court must receive and study the report and recommendations which "the Director of the Bureau of Prisons believes would be helpful in determining disposition of the case." After that the court's discretion must be exercised to affirm or modify the sentence. Obviously the court must do something; it could not with propriety decline to receive the information from the Bureau of Prisons; and it must then exercise its discretion, if only to affirm what was done before.

The Administrative Office of United States Courts, by letter of July 21, 1958,[6] wrote the Chairman, Senate

[6] Embodied in Senate Report No. 2013, July 29, 1958, to accompany H. J. Res. 424. The legislative history of the Federal Sentencing Act, Title 18, U. S. Code § 4208, is available in U. S. Code Cong. & Adm. News, 85th Cong., 2d Sess., 1958, pp. 3891, et seq.

Committee on the Judiciary, on this legislation, conveying the views of the Judicial Conference,[7] referring to the first commitment as a "tentative sentence".[8] It said:

> The Judicial Conference feels that the sentencing judge *before imposing final sentence* should be able to receive, if he deems advisable, a more complete study of the defendant. (Italics supplied)[9]

The Conference Report[10] itself establishes the principle that final sentence can be imposed only after the study has been made.

> This section [now 4208b] will also permit the court, in particularly complex cases, to commit the defendant to the Attorney General for a 3- to 6-month period for study and observation. *After the court receives a summary of the Attorney General's findings, it may impose final sentence* under any applicable statute. (Italics supplied)

In *United States* v. *Behrens*, No. 86 this Term, the Solicitor General's brief discusses the legislative history in learned and extensive terms.[11] We agree completely with the analysis regarding finality of sentence as coming after the study (Br. 25):

> The House of Representatives eliminated the provisions for flexible parole eligibility and for committing a prisoner for *study prior to final sentence* (104 Cong. Rec. 13391-13401) but they were *re-*

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[7] Id. at p. 3894.

[8] Id. at p. 3897, last paragraph.

[9] Id. at p. 3898.

[10] Id. at p. 3905.

[11] *Behrens* involves not the right to appeal under this statute, but the right to be present in court when the reports are acted upon.

stored by the Senate (104 Cong. Rec. 15353). (Italics supplied)

This legislative history shows, as clearly as language can, that the Congress intended the first commitment to be "tentative" only, and entrusted the district court with discretion to act finally on the reports and recommendations of the Director of the Bureau of Prisons. That was the express view of the Judicial Conference, the Administrative Office of United States Courts, of the Senate Committee, and the Conference Committee.[12]

Fundamental is the rule that so long as the court holds open any question of fact or law, the judgment is not final and cannot be appealed. *Beebe* v. *Russell*, 60 U.S. (19 How.) 283, 284 (1857). "Tentative" decisions are certainly not appealable. *United States* v. *Smith*, 331 U.S. 469, 474 (1947). As Chief Justice Hughes said in the *Berman Case, supra*, the test is whether there is nothing to be done but enforcement of the decree. Plainly, that is not the case here, where the study, reports and recommendations have to be formulated, considered by the court, and acted upon.

It would seem that the correct standard for this case is well stated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949):

> The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. * * * So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. * * *
>
> Nor does the statute permit appeals, even from fully consummated decisions, where they are but

[12] See notes 6 to 10, *supra*.

> steps towards final judgment in which they will merge.

Precisely that situation is presented by the case at bar: the commitment is for study and report; the court imposes final sentence after it is fully informed. The original commitment order is merged in the final disposition. By law the commitment is deemed to be for the maximum, only to leave open to the court the full range of statutory penalty if the report and recommendations so warrant.

B. The Record in the District Court Clearly Shows the Original Commitment Was Tentative, and Not Final, Because the Court Was Uncertain as to the Proper Sentence, and Needed "More Detailed Information", as Contemplated by the Statute

When this matter first came on for sentencing, March 26, 1962, the court was informed there was no recommendation because the probation report was incomplete. There was, however, a clinical record from a Veterans Administration Hospital (R. 1). Medical testimony showed the defendant was in need of psychiatric care and this was a condition of long standing. He had been hospitalized since the date of conviction in December, 1961, and the Veterans Administration physician thought incarceration might interfere with treatment he was then receiving (R. 4-5).

An adjournment was taken for two weeks (R. 6) to April 9, 1962 (R. 7). At that time the United States Attorney recommended commitment under 18 U.S Code § 4208(b).

When the court asked defense counsel if he was familiar with the statute, the answer was (R. 7):

> Yes, I have just read it, if Your Honor please. Section 4208(b) obviously is designed to insure

at least some supervision by way of treatment for a period of time no less than three months.

The Court: Yes.

The United States Attorney made no comment, though he was physically present. No one considered it a final deposition of the matter.

Following a colloquy between the court and counsel, the District Judge said (R. 8):

> Well, I have done something in the interim with respect to facilities for psychiatric and psychological treatment in our institutions and I have a communication here from our Director of the Bureau of Prisons, Mr. Bennett.
>
> It was my intention when the case came on before to impose a jail sentence. But on hearing evidence adduced by counsel, I decided then, not having a complete probation report, to pause and make some investigation on my own account.
>
> Of course I was familiar then and am familiar now with 4208(b) and they have adequate facilities to determine these matters. I think it may be a good idea, a progressive idea, for the Court to know something more about the defendant than I have seen or heard up to date. Mr. Clerk.
>
> [The Court confers with the Clerk.]
>
> The Clerk: Benjamin W. Corey, hearken to your sentence as the Court has awarded it against you. The Court orders that you be committed to the custody of Attorney General of the United States under Title 18, United States Code, 4208(b).

It may be noted that no term of confinement was prescribed by the court, as contrasted with *United States* v. *Behrens*, 190 F. Supp. 799 (S.D. Ind. 1961), where a

specific prison term of years was prescribed. The only order was a general delivery to custody of the Attorney General for study as prescribed by law. This is the "tentative" sentence referred to in the Senate Report,[13] *supra*, and recognized by the Solicitor General's brief in *Behrens, supra*, as (Br. 25) "committing a prisoner for study prior to final sentence (104 Cong. Rec. 13391-13401) * * *."

The case again came before the same District Judge on July 16, 1962.[14] The record shows beyond question that only then was the full statutory duty of the court completed:

> (Monday, July 16, 1962
> Boston, Massachusetts.)
>
> The Clerk: 61-67-F, Criminal, United States against Benjamin W. Corey.
>
> The Court: Now, Mr. Counsel, as you know as a result of our conferences in my lobby, *this case comes back to me with the report concerning the defendant which I have studied and read,* and *now it is my duty to dispose of the case at this point, finally.*
>
> Under our rules, Mr. Corey, I have to inquire whether or not you have anything to say about the disposition of your case at this point.
>
> The Defendant: I want to thank you very much, Your Honor, for according me the opportunity of saying something in behalf of myself, but I should rather leave it in the hands of my attorney.
>
> The Court: You don't care to say anything, and you leave it to counsel.

[13] Note 8, *supra*.

[14] The reporter's original certified transcript of these proceedings has been lodged with the Clerk of this Court.

We have discussed the matter fully for the last half-an-hour in my lobby. But I am compelled to ask you whether or not you wish to say anything in your own behalf before I impose the sentence I am going to impose. Do you care to say anything? If you do, say so.

The Defendant: I still would rather leave it to my attorney, sir.

The Court: Then, Mr. Clerk,—I am going to place you on *probation*, Mr. Corey, for two years, and *I think that is a proper disposition of the case after hearing from the physicians and specialists in the Bureau of Prisons*, but there is one thing I would like to say to you. During this probationary period, I wish you would listen to the members of your family, I wish you would take their advice; it would be voluntary on your part. I am not imposing any conditions at all upon you. I want to see you get well. Do you understand me?

The Defendant: Yes, sir.

The Court: And I wish that you would listen to the members of your family and also our Probation Officer, Mr. Griffin. I have gone over the whole case with your brother, the Doctor. And they know your case very well.

Pass the order, Mr. Clerk, probation for 2 years.

The Clerk: *Benjamin W. Corey, hearken to your sentence as the Court orders it against you.* The Court orders that imposition of sentence be suspended and that you be placed on probation for a term of two years.

You will now report to the Probation Officer. (Italics supplied)

* * * * *

Nothing could more plainly state the court's deferment of sentence from the first session on March 26,

to a later session April 9, when the trial judge stated his own investigation had convinced him it would be proper "for the Court to know something more about the defendant than I have seen or heard up to date." The Court had communicated with the Director of the Bureau of Prisons, and on this basis concluded that he would be "helpful in determining the disposition of the case," as the statute requires.

Only later when the reports and recommendations were received and evaluated did the district court say, "now it is my duty to dispose of the case at this point, finally."

Up to then the matter was tentative, incomplete; on July 16 it became final. Notice of appeal was filed July 19, clearly on time (R. 11).[15]

In the only case under this statute which has reached this Court before, *Grabina* v. *United States,* 369 U.S. 426 (1962), the Solicitor General conceded error in failure to afford the defendant any right of allocution. His memorandum is quoted in *United States* v. *De Blasis,* 206 F. Supp. 38, 39-40 (D. Md. 1962); it shows the same lack of finality in the first commitment. The Solicitor General said (p. 40):

> The trial judge obviously believed that he was *deferring sentence to await reports* under 18 U.S.C. 4208(b), rather than imposing sentence which later would be subject to reduction. (Italics supplied).

Such was the trial court's interpretation here of § 4208(b).

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[15] It may be noted that the docket entries (R. 11) show only one sentence in this case, to wit, that imposing probation on July 17, 1962; followed by the Notice of Appeal July 19.

C. Orderly Administration of Criminal Justice Requires Deferment of Appeal Until the District Court Has Completed Its Action

In order to make this statute serviceable, the District Courts must be able to call for the advisory help of the Bureau of Prisons. They cannot do so if the simple act of referring the matter is to be considered a final appealable judgment. If it be final, notice of appeal must be given within 10 days under Rule 37(a)(2). The entire case is then moved to the Court of Appeals (Rule 39, Federal Rules of Criminal Procedure) to run a course which may extend for a year or more. The District Court's jurisdiction is ended. *United States* v. *Smith*, 331 U.S. 469, 474 (1947); *Berman* v. *United States*, 302 U.S. 211, 214 (1937); *Euziere* v. *United States*, 266 F. 2d 88, 91 (10th Cir. 1959); *United States* v. *Tuffanelli*, 138 F. 2d 981, 984 (7th Cir., 1943). The Bureau of Prisons' reports and recommendations cannot be followed or applied because the trial court's hands are stayed until the appellate court's mandate is received, possibly years later. *United States* v. *Smith, supra; Berman* v. *United States, supra.* In the *Smith Case, supra,* this Court directed extraordinary writs of mandamus and prohibition, to prevent a District Judge from exercising jurisdiction after the cause had been appealed.

The notice of appeal may postpone the study indefinitely, for the appellant is plainly entitled to bail pending appeal. Rule 46(a)(2), Federal Rules of Criminal Procedure. Thus a defendant who desires the benefit of the careful study and evaluation intended by Congress, is forced to appeal and remove the matter from the District Court's jurisdiction.

If the referral to the Bureau of Prisons for study be considered a final sentence for the maximum term, then many cases will be appealed, which might otherwise result finally in suspended or reduced sentences, with no appeal. Why congest the appellate courts with tentative decisions which the trial court almost certainly will reduce on recommendation of the Bureau of Prisons, in many cases obviating the need or desire to appeal.

This enlightened approach to sentencing was adopted by Congress after careful study, with the assistance of this Court's administrative officers. It appears that the First Circuit has totally disregarded established standards of finality, and the legislative history of the law. It has given no thought to the effect on the administration of justice. To hold that defendant should have appealed when the case was referred to the Bureau of Prisons for study is to require frustration of the statutory purpose.

On the other hand, a defendant so appealing may well face dismissal on a challenge to the appellate jurisdiction on the ground there is more to be done by the District Court, and the decision below lacks finality. *Berman* v. *United States, supra; United States* v. *Tuffanelli,* 138 F. 2d 981, 984 (7th Cir., 1943).

CONCLUSION

The statutory plan contemplates a tentative commitment for study, to be followed by a final sentence. Only then can an intelligent appraisal of the need for appeal be made; only then would a notice of appeal be in order.

It is submitted that the order of the Court of Appeals, dismissing the appeal as too late, should be reversed.

Respectfully submitted,

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August, 1963

APPENDIX

Title 18, U. S. Code:

§ 4208. Fixing eligibility for parole at time of sentencing

(a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine.

(c) Upon commitment of a prisoner sentenced to imprisonment under the provisions of subsection (a), the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made of the prisoner and shall furnish to the board of parole a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole. This report may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. The board of parole may make such other investigation as it may deem necessary.

It shall be the duty of the various probation officers and government bureaus and agencies to furnish the board of parole information concerning the prisoner, and whenever not incompatible with the public interest, their views and

recommendations with respect to the parole disposition of his case.

(d) The board of parole having jurisdiction of the parolee may promulgate rules and regulations for the supervision, discharge from supervision, or recommitment of paroled prisoners. Added Pub. L. 85-752, § 3, Aug. 25, 1958, 72 Stat. 845.

Rule 37. Federal Rules of Criminal Procedure

(a)(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

Rule 39. Federal Rules of Criminal Procedure

(a) Supervision in Appellate Court. The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the district court, or to modify or vacate any order made by the district court or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail.

Rule 46. Federal Rules of Criminal Procedure

(a)(2) Upon Review. Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay. Pending appeal to a court of appeals, bail may be allowed by the trial judge, by the court of appeals, or by any judge thereof or by the circuit justice, to run until final termination of the proceedings in all courts. Pending appeal or certiorari to the Supreme Court, bail may be allowed by the court of appeals or by any judge thereof or by the Supreme Court or by a Justice thereof. Any court or any judge or justice authorized to grant bail may at any time revoke the order admitting the defendant to bail.